Supreme Court, U. S.
FILED
MAY 2 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1279.

RALPH H. ARABIAN ET AL.,
PETITIONERS,

v.

JOHN J. DALEY ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent John J. Daley in Opposition.

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Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit, entered on November 21, 1978, is reported as Ralph H. Arabian et al. v. Joseph Ayoub et al., Case No. 78-8119, and appears on page 1a of petitioners' Appendix A, included in the petition for certiorari. The court held that the petitioners' claim was without merit and the judgment of the United States District Court was affirmed. That judgment appears on page 2a of petitioners' Appendix A, and in that court the complaint was dismissed for failure to state a claim

upon which relief could be granted under Rule 12(b)(6), Fed. R. Civ. P. A memorandum of decision was filed therewith and appears on pages 3a-9a of petitioners' Appendix A.

Questions Presented for Review.

The petitioners are seeking a determination that Mass. G.L. c. 208, § 17, and Massachusetts Probate Court Rule 47, relating to the authority of a court to award attorneys' fees in a divorce action, are unconstitutional. The Probate Rule, Mass. Probate Court Rule 47, as it existed before being repealed in 1975, appears on page 4a of petitioners' Appendix A included in the petition for writ of certiorari filed herein. The statute, Mass. G.L. c. 208, § 17, as it existed prior to amendment in 1975, appears on page 4a of Appendix A. The specific question presented by the petitioners is whether the statute and rule violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981, 1985(3) and 1988. They are seeking an award of damages as well as declaratory and injunctive relief.

Counter-Statement of Facts.

Each of the petitioners' wives, in their divorce actions in the Plymouth County Probate Court, applied through her attorney for payment of attorneys' fees. These applications were made pursuant to former section 17 and former Rule 47. The wives of the petitioners were successful in their applications and the petitioners paid the sums ordered by the Probate Court. As a result of the action of the Probate Court in so

ordering the petitioners to pay their wives' attorneys' fees, the petitioners brought a complaint in the United States District Court on February 5, 1975, requesting that the statute and the rule be declared unconstitutional as violative of the Equal Protection Clause. Their contention in that action was that the former section 17 and Rule 47 discriminate on the basis of sex by allowing a wife to obtain counsel fees from her husband without according the husband a similar privilege.

The respondent John J. Daley is the Register of Probate in Plymouth County, Massachusetts, and held that position at the time of the application and award to the wives of petitioners. Respondent Daley was not responsible for the award of fees made in this case at the Plymouth County Probate Court. The respondent's duties are administrative in nature, and he played no part in the interpretation of Massachusetts law, nor does he participate in decisions made by the court pertaining thereto.

In 1975, after the filing of the complaint in this matter, the Massachusetts Supreme Judicial Court, in *House* v. *House*, 368 Mass. 120 (1975), held that the Massachusetts statutes pertaining to counsel fees in divorce actions were not, when taken as a whole, violative of the Equal Protection Clause of the Fourteenth Amendment. That case involved the denial of a wife's application for counsel fees made at the time of the grant of a decree nisi in her divorce action.

In discussing Rule 47, the court found no problem of discrimination based on gender. Rather, the court held that the Rule itself does not create any right to attorneys' fees in divorce cases. The purpose of the rule, as interpreted by the court, is to specify the requirements that a wife must meet in her application for counsel fees. 368 Mass. at 121. The court found that the same standards that must be met by wives would apply to husbands seeking such fees in divorce actions

and this is true despite the absence of any specific language pertaining thereto. 368 Mass. at 122.

Since the highest court in the Commonwealth has held that the requirements of the rule are to apply in an even-handed manner to both husbands and wives, there can be no basis for an argument that the statute is violative of the Equal Protection Clause. The rule deals merely with the procedural requirements for applying for counsel fees in divorce proceedings, and in Massachusetts there is absolutely no discrimination based on sex as applied in light of the *House* case.

Once the procedural burdens of Rule 47 are met by a party, the Probate Court has the authority to approve these applications pursuant to Mass. G.L. c. 208, §§ 17 and 38. Although section 17 as it existed at the time of the *House* case gave the Probate Court the power to grant attorneys' fees to a wife only, that case held that Mass. G.L. c. 208, § 38, empowers the court to grant fees to both husbands and wives. 368 at 122.

In effect, then, although the specific statute contended to be discriminatory deals with the awarding of attorneys' fees to wives only, the Massachusetts law, taken in its entirety, in no way discriminates against husbands in divorce actions seeking attorneys' fees. Procedurally, Rule 47 and the common law, through the *House* case, provide a basis for applications for attorneys' fees to husbands and wives equally. Substantively, there are the two sections of Mass. G.L. c. 208, namely, sections 17 and 38. Together they provide the basis for such awards on an equal basis.

Argument.

Mass. G.L. c. 208, § 38, read at the time of the original complaint in this case (and still reads): "In any proceeding

under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them."

This matter was discussed in the *House* case where it was held that section 38 gives the Probate Court the power to award costs and expenses, including counsel fees, to either party. Another decision of the Massachusetts Supreme Judicial Court which held that section 38 applied to counsel fees for either party in a divorce proceeding is *Kelley* v. *Kelley*, Mass. Adv. Sh. (1978) 816, 817, 374 N.E. 2d 580.

In light of the holdings of these Massachusetts cases and their interpretations of the Massachusetts statutes dealing with this problem, there is no constitutional question for this Court to decide. It was held in *General Investment & Service Corp.* v. *Wichita Water Co.*, 236 F. 2d 464, 468 (10th Cir. 1956), that in cases which involve state laws there are certain considerations which require federal courts to refrain from exercising jurisdiction when the parties have an adequate determination in the state court. This comes under the general heading of comity, and it is suggested that the instant case is just such a controversy and that such restraint should be exercised.

There is no case or controversy in this matter, in that the petitioners have never been denied counsel fees and in fact have not even applied for them. That being true, they have no standing to complain that they were not afforded equal protection of the laws. Certainly, if they met the necessary standards under Massachusetts law for the awarding of counsel fees in such cases, Massachusetts law would mandate that they be so awarded. That is not the case here though, and it is respectfully suggested that to decide the issue raised by the

petitioners would simply be to deal with abstract issues of law which have no vitality in the present case.

It was found by the Court of Appeals that there was no merit to the petitioners' claim of a violation of the Equal Protection Clause of the Fourteenth Amendment, and the complaint was ordered dismissed. There is no important issue of law which the petitioners present in their petition. This Court has held that where there is no issue which is of importance to the public as a whole, or which need be decided to resolve substantial conflicts in the Circuit Courts, certiorari should not be granted. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Conclusion.

Wherefore, respondent John J. Daley respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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